

of § 1.1502-20(e) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502-20.

(f) *Investment adjustments and earnings and profits.* For purposes of this section, the rules and examples of § 1.1502-20 (f) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502-20.

(g) *Effective dates—(1) General rule.* Except as otherwise provided in this paragraph (g), this section applies with respect to dispositions and deconsolidations on or after November 19, 1990, but only to the extent the disposition or deconsolidation is not subject to § 1.1502-20. For this purpose, dispositions deferred under §§ 1.1502-13 and 1.1502-14 (as contained in the 26 CFR part 1 edition revised as of April 1, 1995) are deemed to occur at the time the deferred gain or loss is taken into account unless the stock was deconsolidated before November 19, 1990. If stock of a subsidiary became worthless during a taxable year including November 19, 1990, the disposition with respect to the stock is treated as occurring on the date the stock became worthless.

(2) *Binding contract rule.* For purposes of this paragraph (g), if a disposition or deconsolidation is pursuant to a binding written contract entered into before March 9, 1990, and in continuous effect until the disposition or deconsolidation, the date the contract became binding is treated as the date of the disposition or deconsolidation.

(3) *Application of § 1.1502-20T to certain transactions—(i) In general.* If a group files the certification described in paragraph (g)(3)(ii) of this section, it may apply § 1.1502-20T (as contained in the CFR edition revised as of April 1, 1990), to all of its members with respect to all dispositions and deconsolidations by the certifying group to which § 1.1502-20T otherwise applied by its terms occurring—

(A) On or after March 9, 1990 (but only if not pursuant to a binding contract described in § 1.337(d)-1T(e)(2) (as contained in the CFR edition revised as of April 1, 1990) that was entered into before March 9, 1990); and

(B) Before November 19, 1990 (or thereafter, if pursuant to a binding contract described in § 1.1502-20T(g)(3) that was entered into on or after March 9, 1990 and before November 19, 1990).

The certification under this paragraph (g)(3)(i) with respect to the application of § 1.1502-20T to any transaction described in this paragraph (g)(3)(i) may not be withdrawn and, if the certification is filed, § 1.1502-20T must be applied to all such transactions on all returns (including amended returns) on which such transactions are included.

(ii) *Time and manner of filing certification.* The certification described in paragraph (g)(3)(i) of this section must be made in a separate statement entitled “[insert name and employer identification number of common parent] hereby certifies under § 1.337(d)-2(g)(3) that the group of which it is the common parent is applying § 1.1502-20T to all transactions to which that section otherwise applied by its terms.” The statement must be signed by the common parent and filed with the group’s income tax return for the taxable year of the first disposition or deconsolidation to which the certification applies. If the separate statement required under this paragraph (g)(3) is to be filed with a return the due date (including extensions) of which is before November 16, 1991, the statement may be filed with an amended return for the year of the disposition or deconsolidation that is filed within 180 days after September 13, 1991. Any other filings required under § 1.1502-20T, such as the statement required under § 1.1502-20T(f)(5), may be made with the amended return, regardless of whether § 1.1502-20T permits such filing by amended return.

[T.D. 8364, 56 FR 47390, Sept. 19, 1991; 57 FR 53550, Nov. 12, 1992; T.D. 8560, 59 FR 41674, Aug. 15, 1994; T.D. 8597, 60 FR 36679, July 18, 1995]

#### § 1.338-0 Outline of topics.

This section lists the captions contained in the regulations under section 338.

##### § 1.338-1 Elections under section 338.

- (a) Scope.
- (b) Nomenclature.

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- (c) Definitions.
  - (1) Acquisition date.
  - (2) Affiliated group.
  - (3) Common parent.
  - (4) Consistency period.
  - (5) Domestic corporation.
  - (6) Old target's final return.
  - (7) Purchasing corporation.
  - (8) Qualified stock purchase.
  - (9) Related persons.
  - (10) Section 338 election.
  - (11) Section 338(h)(10) election.
  - (12) Selling group.
  - (13) Target; old target; new target.
  - (14) Target affiliate.
  - (15) 12-month acquisition period.
- (d) Time and manner of making election.
- (e) Returns including tax liability from deemed sale.
  - (1) In general.
  - (2) Old target's final taxable year otherwise included in consolidated return of selling group.
    - (i) General rule.
    - (ii) Separate taxable year.
    - (iii) Carryover and carryback of tax attributes.
  - (iv) Old target is a component member of purchasing corporation's controlled group.
  - (3) Old target an S corporation.
  - (4) Combined deemed sale return.
    - (i) General rule.
    - (ii) Gain and loss offsets.
    - (iii) Procedure for filing a combined return.
  - (iv) Consequences of filing a combined return.
  - (5) Deemed sale excluded from purchasing corporation's consolidated return.
  - (6) Due date for old target's final return.
    - (i) General rule.
    - (ii) Application of § 1.1502-76(c).
      - (A) In general.
      - (B) Deemed extension.
      - (C) Erroneous filing of deemed sale return.
      - (D) Erroneous filing of return for regular tax year.
      - (E) Last date for payment of tax.
    - (7) Examples.
    - (f) Waiver.
    - (1) Certain additions to tax.
    - (2) Notification.
    - (3) Elections or other actions required to be specified on a timely filed return.
      - (i) In general.
      - (ii) New target in purchasing corporation's consolidated return.
      - (4) Examples.
      - (g) Special rules for foreign corporations or DISCs.
        - (1) Elections by certain foreign purchasing corporations.
          - (i) General rule.
          - (ii) Qualifying foreign purchasing corporation.
          - (iii) Qualifying foreign target.
          - (iv) Triggering event.

- (v) Subject to United States tax.
- (2) Acquisition period.
- (3) Statement of section 338 election may be filed by United States shareholders in certain cases.
- (4) Notice requirement for U.S. persons holding stock in foreign target.
  - (i) General rule.
  - (ii) Limitation.
  - (iii) Form of notice.
  - (iv) Timing of notice.
  - (v) Consequence of failure to comply.
  - (vi) Good faith effort to comply.

*§ 1.338-2 Miscellaneous issues under section 338.*

- (a) Scope.
- (b) Rules relating to qualified stock purchases.
  - (1) Purchasing corporation requirement.
  - (2) Purchase.
    - (i) Definition.
    - (ii) Examples.
  - (3) Date of purchase from related corporations.
    - (i) In general.
    - (ii) Examples.
  - (4) Acquisition date for tiered targets.
    - (i) Stock sold in deemed asset sale.
    - (ii) Examples.
  - (5) Effect of redemptions.
    - (i) General rule.
    - (ii) Redemptions from persons unrelated to the purchasing corporation.
    - (iii) Redemptions from the purchasing corporation or related persons during 12-month acquisition period.
      - (A) General rule.
      - (B) Exception for certain redemptions from related corporations.
    - (iv) Examples.
  - (c) Effect of post-acquisition events on eligibility for section 338 election.
    - (1) Post-acquisition elimination of target.
    - (2) Post-acquisition elimination of the purchasing corporation.
    - (3) Consequences of post-acquisition elimination of target.
      - (i) Scope.
      - (ii) Continuity of interest.
      - (iii) Control requirement.
      - (iv) Example.
      - (v) Effective date.
  - (d) Miscellaneous matters affecting new target.
    - (1) General rule for subtitle A.
    - (2) Exceptions for subtitle A.
    - (3) Taxable year of new target.
    - (4) General rule for other provisions of the Internal Revenue Code.

*§ 1.338-3 Deemed sale and aggregate deemed sale price.*

- (a) Scope.
- (b) Definitions.
  - (1) ADSP.

- (2) Allocable ADSP amount.
- (3) Deemed sale gain.
- (4) Classes of assets.
- (c) Deemed sale of target affiliate stock.
  - (1) In general.
  - (2) General rule.
  - (3) Deemed sale of foreign target affiliate by a domestic target.
  - (4) Deemed sale producing effectively connected income.
  - (5) Deemed sale of insurance company target affiliate electing under section 953(d).
  - (6) Deemed sale of DISC target affiliate.
  - (7) Anti-stuffing rule.
  - (8) Examples.
  - (d) Determination of ADSP.
    - (1) General rule.
    - (2) Grossed-up basis of the purchasing corporation's recently purchased target stock.
    - (3) Liabilities.
    - (4) Other relevant items.
    - (5) Calculation of deemed sale gain and loss.
    - (6) Other rules apply in determining ADSP.
    - (7) Cross reference.
    - (8) Examples.

*§ 1.338-4 Asset and stock consistency.*

- (a) Introduction.
  - (1) Overview.
  - (2) General application.
  - (3) Extensions of the general rules.
  - (4) Application where certain dividends are paid.
  - (5) Application to foreign target affiliates.
  - (6) Stock consistency.
  - (b) Consistency for direct acquisitions.
    - (1) General rule.
    - (2) Section 338(h)(10) elections.
    - (c) Gain from disposition reflected in basis of target stock.
      - (1) General rule.
      - (2) Gain not reflected if section 338 election made for target.
      - (3) Gain reflected by reason of distributions.
      - (4) Controlled foreign corporations.
      - (5) Gain recognized outside the consolidated group.
      - (d) Basis of acquired assets.
        - (1) Carryover basis rule.
        - (2) Exceptions to carryover basis rule for certain assets.
        - (3) Exception to carryover basis rule for de minimis assets.
        - (4) Mitigation rule.
          - (i) General rule.
          - (ii) Time for transfer.
        - (e) Examples.
          - (1) In general.
          - (2) Direct acquisitions.
        - (f) Extension of consistency to indirect acquisitions.
          - (1) Introduction.
          - (2) General rule.
          - (3) Basis of acquired assets.
          - (4) Examples.

- (g) Extension of consistency if dividends qualifying for 100 percent dividends received deduction are paid.
  - (1) General rule for direct acquisitions from target.
  - (2) Other direct acquisitions having same effect.
  - (3) Indirect acquisitions.
  - (4) Examples.
  - (h) Consistency for target affiliates that are controlled foreign corporations.
    - (1) In general.
    - (2) Income or gain resulting from asset dispositions.
      - (i) General rule.
      - (ii) Basis of controlled foreign corporation stock.
        - (iii) Operating rule.
        - (iv) Increase in asset or stock basis.
    - (3) Stock issued by target affiliate that is a controlled foreign corporation.
    - (4) Certain distributions.
      - (i) General rule.
      - (ii) Basis of controlled foreign corporation stock.
        - (iii) Increase in asset or stock basis.
    - (5) Examples.
      - (i) [Reserved]
      - (j) Anti-avoidance rules.
    - (1) Extension of consistency period.
    - (2) Qualified stock purchase and 12-month acquisition period.
    - (3) Acquisitions by conduits.
      - (i) Asset ownership.
        - (A) General rule.
        - (B) Application of carryover basis rule.
      - (ii) Stock acquisitions.
        - (A) Purchase by conduit.
        - (B) Purchase of conduit by corporation.
        - (C) Purchase of conduit by conduit.
    - (4) Conduit.
    - (5) Existence of arrangement.
    - (6) Predecessor and successor.
      - (i) Persons.
      - (ii) Assets.
    - (7) Examples.

*§ 1.338-5 International aspects of section 338.*

- (a) Scope.
- (b) Application of section 338 to foreign targets.
  - (1) In general.
  - (2) Ownership of FT stock on the acquisition date.
  - (3) Carryover FT stock.
    - (i) Definition.
    - (ii) Carryover of earnings and profits.
    - (iii) Cap on carryover of earnings and profits.
    - (iv) Post-acquisition date distribution of old FT earnings and profits.
    - (v) Old FT earnings and profits unaffected by post-acquisition date deficits.
    - (vi) Character of FT stock as carryover FT stock eliminated upon disposition.
  - (4) Passive foreign investment company stock.

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- (c) Dividend treatment under section 1248(e).
- (d) Allocation of foreign taxes.
- (e) Operation of section 338(h)(16). [Reserved]
- (f) Examples.

### *§ 1.338(b)-1 Adjusted grossed-up basis.*

- (a) Scope.
- (b) Adjustment events.
- (c) AGUB.
  - (1) In general.
  - (2) Time when AGUB determined.
- (d) Grossed-up basis of recently purchased stock.
  - (1) General rule.
  - (2) Application.
- (e) Basis of nonrecently purchased stock.
  - (1) In general.
  - (2) Effect of gain recognition election.
    - (i) In general.
    - (ii) Basis amount.
    - (iii) Losses not recognized.
    - (iv) Stock subject to election.
- (3) Procedure for making gain recognition election.
  - (i) In general.
  - (ii) Section 338(h)(10) election.
  - (4) Comparison with ADSP formula.
  - (f) Liabilities of new target.
    - (1) In general.
    - (2) Excluded obligations.
      - (i) In general.
      - (ii) Time when excluded obligations taken into account.
    - (3) Liabilities taken into account in determining amount realized on subsequent disposition.
    - (g) Other relevant items.
      - (1) In general.
      - (2) Flow-through of relevant item adjustment to target subsidiary.
      - (3) Adjustments by the Internal Revenue Service.
    - (h) Examples.

### *§ 1.338(b)-2T Allocation of adjusted grossed-up basis among target assets (temporary).*

- (a) Introduction.
  - (1) In general.
  - (2) Fair market value.
  - (b) General rule for allocating adjusted grossed-up basis.
    - (1) Cash and other items designated by the Internal Revenue Service.
    - (2) Other assets.
      - (i) In general.
      - (ii) Class II assets.
      - (iii) Class III assets.
      - (iv) Class IV assets.
      - (v) Class V assets.
    - (c) Certain limitations and special rules for basis allocable to an asset.
      - (1) Basis not to exceed fair market value.
      - (2) Assets subject to other limitations.

- (3) Special rule for allocating adjusted grossed-up basis when purchasing corporation has nonrecently purchased stock.

- (i) Scope.
- (ii) Determination of hypothetical purchase price.
- (iii) Allocation of adjusted grossed-up basis.
- (4) Effective dates.
- (d) Examples.

### *§ 1.338(b)-3T Subsequent adjustments to adjusted grossed-up basis (temporary).*

- (a) Scope.
  - (1) In general.
  - (2) Exceptions to applicability of section.
  - (3) Adjustment of aggregate deemed sale price.
- (b) Definitions.
  - (1) Contingent liability.
  - (2) Contingent amount.
  - (3) Reduction amount.
  - (4) Acquisition date asset.
- (c) General rule.
  - (1) Time when increases in adjusted grossed-up basis taken into account.
  - (2) Time when decreases in adjusted grossed-up basis taken into account.
  - (3) Amount of increases and decreases in adjusted grossed-up basis.
  - (d) Allocation of increases in adjusted grossed-up basis.
    - (1) In general.
    - (2) Effect of disposition or depreciation of acquisition date assets.
  - (e) Allocation of decreases in adjusted grossed-up basis.
    - (1) In general.
    - (2) Effect of disposition of assets or reduction of basis below zero.
    - (3) Section 338 property.
  - (f) Special rule for allocation of increases (or decreases) in adjusted grossed-up basis when hypothetical purchase price was used in allocating adjusted grossed-up basis.
    - (1) Scope.
    - (2) Allocation of increases (decreases) in adjusted grossed-up basis.
    - (3) Allocation to contingent income assets.
    - (g) Special rule for allocation of increases (decreases) in adjusted grossed-up basis to specific assets.
      - (1) Patents and similar property.
        - (i) Scope.
        - (ii) Specific allocation.
      - (2) Internal Revenue Service authority.
      - (h) Changes in old target's aggregate deemed sale price of assets.
        - (1) General rule.
          - (i) In general.
          - (ii) Redetermination of aggregate deemed sale price if the elective formula under section 338(h)(11) is used.
          - (iii) Redetermination of aggregate deemed sale price if the elective formula under section 338(h)(11) is not used.

(2) Procedure for transactions in which section 338(h)(10) is not elected.

(i) Income or loss included in new target's return.

(ii) Carryovers and carrybacks.

(A) Loss carryovers to new target taxable years.

(B) Loss carrybacks to taxable years of old target.

(C) Credit carryovers and carrybacks.

(3) Procedure for transactions in which section 338(h)(10) is elected.

(i) [Reserved.]

(j) Examples.

*§ 1.338(h)(10)-1 Deemed asset sale and liquidation.*

(a) Scope.

(b) Nomenclature.

(c) Definitions.

(1) Section 338(h)(10) target.

(2) S corporation shareholders.

(3) Selling consolidated group.

(4) Selling affiliate.

(d) Section 338(h)(10) election.

(1) In general.

(2) Simultaneous joint election requirement.

(3) Irrevocability.

(4) Effect of invalid election.

(e) Certain consequences of section 338(h)(10) election.

(1) Old T.

(2) Selling consolidated group, selling affiliate, or S corporation shareholders.

(i) In general.

(ii) Deemed liquidation of old T.

(iii) Basis of stock not acquired.

(iv) T stock sale.

(v) Example.

(3) Certain minority shareholders.

(i) In general.

(ii) T stock sale.

(iii) T stock not acquired.

(4) P.

(5) New T.

(6) Consolidated return of selling consolidated group.

(f) Deemed sale price.

(1) General rule.

(2) Formula.

(3) Liabilities.

(4) Other relevant items.

(5) Cross-reference.

(g) Examples.

(h) Inapplicability of provisions.

*§ 1.338(i)-1 Effective dates.*

(a) In general.

(b) Elective retroactive application.

(c) MADSP.

(d) Deemed election.

[T.D. 8515, 59 FR 2960, Jan. 20, 1994, as amended by T.D. 8626, 60 FR 54944, Oct. 27, 1995; T.D. 8711, 62 FR 2268, Jan. 16, 1997; T.D. 8710, 62 FR 3459, Jan. 23, 1997]

**§ 1.338-1 Elections under section 338.**

(a) *Scope.* This section prescribes rules relating to elections under section 338. Paragraphs (c)(6), (e), and (g) of this section do not apply to a target for which a section 338(h)(10) election is made.

(b) *Nomenclature.* For purposes of the regulations under section 338 (except as otherwise provided):

(1) T is a domestic corporation that has only one class of stock outstanding.

(2) P is a domestic corporation that purchases stock of T in a qualified stock purchase.

(3) The P group is an affiliated group of which P is a member.

(4) P1, P2, etc., are domestic corporations that are members of the P group.

(5) T1, T2, etc., are domestic corporations that are target affiliates of T. These corporations (T1, T2, etc.) have only one class of stock outstanding and may also be targets.

(6) S is a domestic corporation (unrelated to P and B) that owns T prior to the purchase of T by P. (S is referred to in cases in which it is appropriate to consider the effects of having all of the outstanding stock of T owned by a domestic corporation.)

(7) A, a U.S. resident or citizen, is an individual (unrelated to P and B) who owns T prior to the purchase of T by P. (A is referred to in cases in which it is appropriate to consider the effects of having all of the outstanding stock of T owned by an individual who is a U.S. resident or citizen. Ownership of T by A and ownership of T by S are mutually exclusive circumstances.)

(8) B, a U.S. resident or citizen, is an individual (unrelated to T, S, and A) who owns the stock of P.

(9) F, used as a prefix with the other terms in this paragraph (b), connotes foreign, rather than domestic, status. For example, FT is a foreign corporation (as defined in section 7701(a)(5)) and FA is an individual other than a U.S. citizen or resident.

(10) CFC, used as a prefix with the other terms in this paragraph (b) referring to a corporation, connotes a controlled foreign corporation (as defined in section 957, taking into account section 953(c)). A corporation identified with the prefix F may be a controlled